

³ The Board notes that, following the December 22, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability, commencing April 8, 2015, causally related to her accepted January 8, 2014 employment injury.

FACTUAL HISTORY

On January 16, 2014 appellant, then a 25-year-old temporary police officer,⁴ filed a traumatic injury claim (Form CA-1) alleging that on January 8, 2014 she sustained severe left foot pain due to walking approximately three-quarters of a mile in duty gear while in the performance of duty. She stopped work on January 8, 2014 and returned on January 16, 2014. OWCP accepted the claim for left plantar fibromatosis and subsequently expanded acceptance of the claim to include left lower limb and left foot/ankle reflex sympathetic dystrophy (RSD). In an August 13, 2014 letter, it informed appellant that she would be paid wage-loss compensation on the periodic rolls beginning April 7, 2014.

On February 9, 2015 Dr. Joseph Agostinelli, a treating podiatrist, released appellant to return to sedentary work.

On March 3, 2015 returned to a full-time modified sedentary position.

On March 10, 2015 OWCP related that appellant had returned to a modified police position working 40 hours per week. It found that the wages earned in the modified position either met or exceeded the wages she earned in her date-of-injury position. Thus, OWCP informed appellant that it was terminating her wage-loss compensation.

On March 25, 2015 appellant accepted the employing establishment's offer of a temporary light-duty police officer position requiring her to work in a sedentary, seated position.

On April 8, 2015 Dr. Agostinelli placed appellant off work until further notice.

By notice dated May 13, 2015, OWCP related that appellant had returned to a modified police position on March 3, 2015, but had stopped work on April 8, 2015. It advised her that the modified police offer position was suitable work, and also advised her of the provisions of 5 U.S.C. § 8106(c)(2) for terminating wage-loss compensation and entitlement to a schedule award upon abandonment suitable work. Appellant was also informed of her right to file a claim for a recurrence of disability. OWCP afforded her 30 days to submit additional evidence or argument. No response was received.

OWCP, in a letter dated June 17, 2015, notified appellant that her reasons for abandoning the position were not valid and provided her with an additional 15 days to report to the position or her wage-loss compensation and entitlement to schedule award benefits would be terminated. It advised her that the position remained available.

⁴ Appellant was hired as a term employee with her term set to expire on May 20, 2016. The employing establishment removed her from employment, effective April 30, 2016, due to her inability to perform the essential functions of her position.

By decision dated July 29, 2015, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective that date, based on her abandonment of suitable work.

On August 3, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on March 17, 2016.

On August 14, 2015 OWCP received reports dated May 22 and July 1, 2015 from Dr. Agostinelli. In a May 22, 2015 report, Dr. Agostinelli diagnosed chronic RSD/complex regional pain syndrome (CRPS) left lower extremity pain, which he attributed to appellant's accepted employment injury and he opined that this diagnosis rendered her totally disabled. He reported that appellant had been released to sedentary work, but that the modified position caused significant disabling left lower extremity pain.

In a July 1, 2015 report, Dr. Agostinelli diagnosed left foot and ankle RSD, which he noted were accepted employment conditions. He indicated that appellant had been released to sedentary work in February 2015. Following acceptance of a position in late March 2015, appellant was seen in early April 2015 for left foot and ankle swelling, greater discoloration, and coolness of temperature. Based on the increased objective symptoms, Dr. Agostinelli determined that the modified position was not sufficiently restrictive and placed her off work.

On October 5, 2015 OWCP received a May 4, 2015 report from Dr. Agostinelli diagnosing left cyanosis, left foot contusion, left ankle joint pain, left plantar fasciitis, and left RSD/CRPS. Under history of injury, Dr. Agostinelli reported that appellant sustained a left foot injury with CRPS/RSD pain, swelling, instability, discoloration, and left foot, ankle, and lower leg disability. He noted that appellant was currently not working.

In a March 23, 2016 report, Dr. Agostinelli diagnosed left foot and ankle RSD and restrictions of no standing, lifting, walking, or carrying. He reported that increased restrictions were assigned in April 2015 based on appellant's exhibiting additional left ankle and foot swelling and discoloration, which he attributed to insufficient work restrictions for the sedentary position. Based on her increased symptomatology in early April 2015, Dr. Agostinelli placed appellant off work. He deferred to the opinion of Dr. Aaron B. Stein, Board-certified in pain medicine and anesthesiology, regarding appellant's work restrictions on and after July 1, 2015 for her accepted RSD condition.

By decision dated April 28, 2016, the hearing representative found that, at the time of the July 29, 2015 decision, OWCP had met its burden of proof to terminate appellant's compensation pursuant to 5 U.S.C. § 8106(c) for abandonment of suitable work, effective July 29, 2015. He indicated that, since OWCP had met its burden to terminate appellant's compensation benefits, that compensation benefits should not be reinstated. However, the hearing representative found that further medical development was required regarding appellant's work stoppage on April 8, 2015, based upon new evidence of record. He instructed OWCP to refer appellant for a second opinion evaluation to assess appellant's accepted conditions and to clearly identify the requirement of the abandoned light-duty position as of April 8, 2015. The hearing representative also instructed OWCP to address appellant's work capacity and whether she abandoned the modified position.

Subsequent to the April 28, 2016 decision, OWCP received reports dated April 19 and May 3, 2016 from Dr. Stein and a May 4, 2016 report from Dr. Agostinelli.

On May 12, 2016 appellant, through counsel, requested reconsideration of the hearing representative's finding that appellant's compensation benefits were properly terminated on July 29, 2015.

On September 28 and October 12, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Roman Kesler, Board-certified in neurology and sleep medicine, for an evaluation of appellant's accepted conditions, whether they had resolved, her work restrictions, and whether appellant was totally disabled from performing her modified position commencing April 8, 2015.

In a report dated December 7, 2016, Dr. Kesler, based upon a review of the medical records, a statement of accepted facts (SOAF), and physical examination, diagnosed RSD/CRPS due to the accepted January 8, 2014 employment injury. He concluded that the CRPS/RSD condition had not resolved, would worsen, and was permanent. As to the diagnosis of plantar fibromatosis, Dr. Kesler deferred to a podiatrist. He observed that appellant's subjective complaints did not outweigh her objective findings. Dr. Kesler opined that on the date appellant stopped work, April 8, 2015, she was not performing any duties which would have aggravated or caused the diagnosed conditions to make her totally disabled. He opined that appellant was capable of performing the offered position as long as it was sedentary. However, Dr. Kesler further opined that it was doubtful that she would be able to work full time due to possible severe pain.

In a letter dated January 27, 2017, OWCP referred appellant to Dr. Scott Rickoff, a podiatrist, for an opinion on whether appellant continued to have residuals and disability due to the accepted left plantar fibromatosis. Dr. Rickoff was also asked to provide an opinion as to whether appellant's work duties on April 8, 2015 caused or aggravated her accepted conditions such that she was totally disabled.

Dr. Rickoff, in a report dated February 16, 2017, noted appellant's history of injury and provided examination findings. He diagnosed plantar fascial fibromatosis, left foot pain, and left lower limb CRPS. In support of this opinion, Dr. Rickoff noted appellant's extreme pain and discomfort on palpation of the left foot. As to her work capacity, he concluded that she was unable to bear weight on her left foot and leg, but was capable of sitting two hours in appropriate circumstances. Dr. Rickoff recommended that appellant be referred for vocational rehabilitation.

By decision dated March 31, 2017, OWCP denied wage-loss compensation for the period April 8 to July 29, 2015. It noted that both Dr. Kesler and Dr. Rickoff concluded that, while appellant's condition had worsened, she could have worked in the modified position offered to her. OWCP further noted that the prior remand order did not vacate the section 8106(c) termination so she was not entitled to wage-loss compensation or a schedule award due to her refusal of a suitable position. It also concluded that both second opinion physicians determined that appellant's abandonment of the modified position was not warranted.

On April 4, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on October 10, 2017.

In an April 17, 2017 report, Dr. Agostinelli disagreed with Dr. Kesler's opinion that appellant had been capable of performing the duties of the modified position in March/April 2015. He indicated that appellant had not been released to return to work in February 2015 and that her March return to a modified position was a clerical error on the part of his office. Dr. Agostinelli opined that, following her return to a modified position in February 2015, appellant sustained a worsening of her condition, which rendered her totally disabled from performing the duties of the modified position. Moreover, he opined that the modified position appellant was outside her work restrictions. Dr. Agostinelli concluded that appellant's flare up following her return to a modified position confirmed that she was incapable of performing sedentary work in March/April 2015. In addition, he concluded that appellant had been totally disabled on and after March 2015 due to her RSD condition.

By decision dated December 22, 2017, OWCP's hearing representative affirmed the March 31, 2017 decision denying appellant's recurrence claim for the period April 8 to July 29, 2015. She found that appellant had not established that the modified position she returned to in March 2015, which had been determined to be suitable work, caused a worsening of her condition, resulting in total disability.

LEGAL PRECEDENT

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury.⁵ OWCP's procedures discuss the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty.⁶ It is noted that the focus is on disability rather than causal relationship of the accepted condition to the employment injury.⁷

The Board has held that, if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability for work.⁸

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's January 8, 2014 claim for the conditions of left plantar fibromatosis and left lower limb and foot/ankle RSD and paid wage-loss compensation and medical benefits. Appellant returned to full-time modified position on March 3, 2015 and accepted

⁵ *C.B.*, Docket No. 19-0121 (issued July 2, 2019); *W.D.*, Docket No 09-0658 (issued October 22, 2009); *G.T.*, 59 ECAB 447 (2008); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013); *see B.R.*, Docket No. 18-0339 (issued January 24, 2019).

⁷ *Id.*

⁸ *See C.B.*, *supra* note 5; *B.R.*, *supra* note 6; *J.W.*, Docket No. 17-0715 (issued May 29, 2018); *G.P.*, Docket No. 14-1150 (issued September 15, 2014); *J.F.*, 58 ECAB 124 (2006)

the employing establishment's offer of a sedentary position on March 25, 2015. She worked in the position until April 8, 2015. Appellant's treating physician, Dr. Agostinelli, has explained that appellant was erroneously allowed to return to work in March 2015 due to a clerical error on the part of his office, and that he placed her off work until further notice on April 8, 2015 due to her objective physical examination findings. OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective July 29, 2015, finding that she had abandoned suitable work. It denied her claim for a recurrence of disability for the period April 8 to July 29, 2015.

OWCP referred appellant to Dr. Rickoff and Dr. Kesler for second opinion evaluations to determine whether appellant was totally disabled from work during the period April 8 to July 29, 2015 causally related due to her accepted January 8, 2014 employment injury. Regarding appellant's work stoppage on April 8, 2015, Dr. Kesler opined that the duties of the position she was performing would not have caused or aggravated the diagnosed conditions. He further opined that it was doubtful that appellant was capable of full-time work due to severe pain she might experience. Dr. Rickoff opined that appellant was unable to bear any weight on her left foot and leg, but was capable of sitting for two hours in an appropriate setting.

In the December 22, 2017 decision, OWCP's hearing representative found that the evidence did not establish that the modified job appellant returned to in March 2015 caused a worsening of her accepted condition. This analysis as to whether appellant's new work duties caused a worsening of her condition would be appropriate for a claim of new occupational injury, but was not appropriate for a recurrence of disability.⁹ If a recurrence is claimed within 90 days of return to work, the focus is simply disability.¹⁰

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹¹ Once OWCP undertakes to further develop the medical evidence, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹² OWCP undertook development of the evidence by referring appellant to Dr. Kesler and Dr. Rickoff for an opinion on appellant's employment-related disability, commencing April 8, 2015, and for an opinion regarding appellant's work capacity and ability to perform the modified position. Neither Dr. Kesler nor Dr. Rickoff fully addressed the issue of disability, commencing April 8, 2015, and appellant's ability to perform the modified position in question. Accordingly, the Board will remand the case to OWCP. On remand OWCP should further develop the medical evidence to determine whether appellant was disabled from the modified position as offered by the employing establishment,

⁹ OWCP's procedures provide that a recurrence of disability does not include a work stoppage caused by a new injury, even if it involves the same part of the body previously injured, or by renewed exposure to the causative agent of a previously suffered occupational disease. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (June 2013). See *J.S.*, Docket No. 18-0726 (issued November 5, 2018).

¹⁰ *Supra* note 7.

¹¹ *C.W.*, Docket No. 19-0231 (issued July 15, 2019); *D.H.*, Docket No. 18-1410 (issued March 21, 2019); *J.W.*, *supra* note 8; *A.A.*, 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹² *C.W.*, *id.*; *J.W.*, *id.*; *A.P.*, Docket No. 17-0813 (issued January 3, 2018).

commencing April 8, 2015, as a result of her accepted employment injury.¹³ Following such further development as OWCP deems necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 6, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹³ *C.W., id.; J.W., id.; S.M.*, 58 ECAB 166 (2006).